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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. MAUREEN MICHELLE HENDERSON, Defendant and Appellant.	A140591 (Humboldt County Super. Ct. No. CR1303143)

After entering a no contest plea, defendant Maureen Michelle Henderson was sentenced to serve a split sentence of two years in county jail and one year on mandatory supervision. On appeal, she contends that conditions of her mandatory supervision are unconstitutionally vague and overbroad because they lack a knowledge requirement, that a condition requiring payment of a collection fee should be reduced and made as a separate order instead of as a condition of mandatory supervision, and that imposition of a booking fee was unauthorized because the court found she did not have the ability to pay the fee. We modify certain conditions of mandatory supervision to include a knowledge requirement and impose the statutory collection fee as a separate order but otherwise affirm the judgment.

PROCEDURAL BACKGROUND

Defendant pleaded no contest to one count of petty theft with three or more prior petty theft convictions. (Pen. Code,[1] § 666) The court denied probation and imposed a

[1]All further statutory references are to the Penal Code unless otherwise specified.

three-year split sentence pursuant to section 1170, subdivision (h)(5)(B) consisting of two years in county jail and one year on mandatory supervision subject to various terms and conditions. Defendant timely filed a notice of appeal.

DISCUSSION

1. *Conditions of mandatory supervision*

Defendant contends that various terms of her mandatory supervision are unconstitutionally vague and overbroad because they do not include a scienter requirement. As we explain, we agree that certain conditions of mandatory supervision should be modified to specify that defendant must knowingly engage in the activity prohibited by the condition.

A. Governing legal principles

We assess the validity and reasonableness of conditions of mandatory supervision using the same standard applied to conditions associated with other forms of supervised release, including probation or parole. (*People v. Martinez* (2014) 226 Cal.App.4th 759, 762–764.) We review a condition of supervised release for abuse of discretion and will uphold the trial court's broad discretion so long as a challenged condition relates generally to criminal conduct or future criminality or specifically to the defendant's crime. (*People v. Lent* (1975) 15 Cal.3d 481, 486; *People v. Olguin* (2005) 45 Cal.4th 375, 379–380.)

The reasonableness of a condition of supervised release may be challenged on appeal only if the defendant objected on that basis in the trial court. (*People v. Welch* (1993) 5 Cal.4th 228, 237; see *In re Sheena K.* (2007) 40 Cal.4th 875, 882 (*Sheena K.*).) However, a reviewing court may examine the constitutionality of a condition, even if not raised in the trial court, if the question can be resolved as a matter of law without reference to the sentencing record. (*Sheena K., supra*, at pp. 888–889.)

"[T]he underpinning of a vagueness challenge is the due process concept of 'fair warning.' " (*Sheena K., supra,* 40 Cal.4th at p. 890.) A condition of supervised release " 'must be sufficiently precise for the [defendant] to know what is required of him, and for the court to determine whether the condition has been violated,' if it is to withstand a

challenge on the ground of vagueness." (*Ibid.*) "A probation condition is constitutionally overbroad when it substantially limits a person's rights and those limitations are not closely tailored to the purpose of the condition." (*People v. Harrison* (2005) 134 Cal.App.4th 637, 641.) A court may modify a vague or overbroad condition to cure the constitutional infirmity. (See *Sheena K., supra,* at p. 892; *People v. Moore* (2012) 211 Cal.App.4th 1179, 1184–1185.)

A condition of supervised release that prohibits association with persons who fall into a particular class or category is vague or overbroad if the condition may be violated without the defendant's knowledge that a particular person fits within the prohibited classification. (*Sheena K., supra,* 40 Cal.4th at pp. 891–892; *People v. Lopez* (1998) 66 Cal.App.4th 615, 631; *People v. Garcia* (1993) 19 Cal.App.4th 97, 102.) For example, in *Sheena K.,* the Supreme Court determined that a probation condition requiring a juvenile defendant to avoid association with anyone disapproved by her probation officer was unconstitutionally vague in the absence of a requirement that she be notified in advance of the persons with whom she could not associate. (*Sheena K., supra,* at p. 891.) The court concluded that the condition could be rendered constitutional with the addition of an explicit scienter requirement specifying that the juvenile was "not to associate with anyone 'known to be disapproved of' by a probation officer or other person having authority over the minor." (*Id.* at p. 892.)

In *People v. Garcia, supra,* 19 Cal.App.4th at page 102, the court determined that a condition of probation prohibiting the defendant from associating with felons, ex-felons, and users or sellers or narcotics was unconstitutionally overbroad because it did not require that the defendant know that the persons were felons, ex-felons, or users or sellers of narcotics. The court modified the condition to require that the defendant refrain from associating "with persons he *knows* to be users or sellers of narcotics, felons, or ex-felons." (*Id.* at p. 103, italics added.)

A condition of supervised release prohibiting a defendant from possessing certain items may be void for vagueness if it fails to specify that the defendant must knowingly possess the item or know that the item falls within the prohibited class. (See *People v.*

Freitas (2009) 179 Cal.App.4th 747, 751.) In *Freitas,* the court concluded that a condition prohibiting the possession of stolen property was unconstitutionally vague and overbroad in the absence of a requirement that the defendant actually know the property he possessed was stolen. (*Ibid.*) The court modified the condition to provide that the defendant " 'not *knowingly* possess property he *knows* is stolen . . . .' " (*Id.* at p. 753, italics added.)

With these principles in mind, we consider defendant's challenge to conditions of mandatory supervision relating to firearms (conditions 9 and 10), knives (condition 11), alcohol (conditions 13 and 15), controlled substances (condition 16), and associating with persons who use or traffic in controlled substances (condition 17).

B. Firearms

Conditions 9 and 10 provide as follows:

"9. Defendant shall not own, possess, have in her vehicle or residence, any firearm, any ammunition that can be used in a firearm, or any other deadly weapon, whether owned by defendant or not."

"10. Defendant shall not own, possess, have in her vehicle or residence any instrument or device which a reasonable person would believe to be capable of being used as a firearm."

As a convicted felon, defendant would violate the law by owning or possessing a firearm. (§ 29800, subd. (a)(1).) She would also violate the law if she owned or possessed ammunition. (§ 30305, subd. (a)(1).) "The statutes prohibiting possession of firearms, ammunition, and deadly weapons are understood to have implicit scienter requirements." (*People v. Rodriguez* (2013) 222 Cal.App.4th 578, 591 (*Rodriguez*).)

In *Rodriguez,* the court rejected a vagueness challenge to a probation condition prohibiting the possession of firearms or ammunition that did not include an express scienter requirement, reasoning as follows: "The weapon possession condition in this case was obviously designed to reinforce general prohibitions against possessing a variety of deadly weapons as well as specific restrictions on felons possessing firearms and ammunition. It follows that the condition has the same implicit scienter requirements

as the statutes it implements. The mental element is constitutionally clear without being explicit." (*Rodriguez, supra,* 222 Cal.App.4th at p. 592.) Likewise, in *People v. Moore, supra,* 211 Cal.App.4th at page 1189, the court concluded that a probation condition prohibiting firearm possession similar to the one here was not unconstitutionally vague and did not require modification.

The court in *Rodriguez* distinguished a condition prohibiting association with certain individuals, such as the one discussed in *Sheena K.*, from a condition prohibiting felons from possessing weapons and ammunition. (*Rodriguez, supra,* 222 Cal.App.4th at p. 592.) Unlike a prohibition on association, which is directed at conduct that is constitutionally protected and not itself criminal, a firearm prohibition is "directed at criminal conduct that is not constitutionally protected." (*Ibid.*) More importantly, "the association condition did not arise from or purport to implement any statutory prohibition, so it was not possible to derive an implicit scienter requirement by interpreting parallel statutory language." (*Ibid.*)

Because the challenged conditions implement statutory prohibitions that include an implied scienter element, the lack of an express scienter requirement does not render the conditions unconstitutionally vague or overbroad. There is no need to modify or strike the firearm possession conditions.

C. Knives

Condition 11 provides:

"11. Defendant shall not own, possess, or have in her vehicle any knife with a blade longer than 2 inches, except kitchen knives which must be kept in her residence and knives relating to her employment."

The Attorney General concedes that the challenged condition should be modified to include a knowledge requirement. The concession is well taken. Without a scienter requirement, defendant could be in violation of the terms of her mandatory supervision if she unknowingly had a knife in her home or vehicle. The condition should be modified to include a scienter element.

D. Alcohol

Conditions 13 and 15 provide as follows:

"13. Defendant shall totally abstain from the use of alcoholic beverages and shall not have in her possession or under her custody or control any alcoholic beverage."

"15. Defendant shall not enter places where alcohol is the chief item of sale."

The Attorney General concedes that the alcohol-related conditions of probation must be modified to include a scienter requirement. Again, we agree with the concession. Absent the alcohol prohibition, it would not be illegal for defendant to consume an alcoholic beverage, to possess alcohol, or to enter an establishment that primarily sells alcohol. Therefore, it is not possible to derive an implicit knowledge requirement by interpreting parallel statutory language. (*Rodriguez, supra,* 222 Cal.App.4th at pp. 591–592.) Further, the prohibition against presence in any place "where alcohol is the chief item of sale" is analogous to prohibitions against presence in places where minors associate (*People v. Turner* (2007) 155 Cal.App.4th 1432, 1436) or where firearms are located (*In re Victor L.* (2010) 182 Cal.App.4th 902, 912–913). Defendant could violate the prohibition by entering a place that primarily sells alcohol even though that fact is unknown to her.

Consequently, the alcohol-related conditions of mandatory supervision must be modified to include a knowledge requirement.

E. Controlled substances

Condition 16 states:

"16. Defendant shall not use, have in her possession or under her custody or control any non-prescribed controlled substance."

Like the condition prohibiting possession of firearms, this condition survives a vagueness and overbreadth challenge because a scienter element is reasonably implicit in the condition. Our Supreme Court has stated that "although criminal statutes prohibiting the possession, transportation, or sale of a controlled substance do not expressly contain an element that the accused be aware of the character of the controlled substance at issue

[citations], such a requirement has been implied by the courts." (*People v. Coria* (1999) 21 Cal.4th 868, 878.)

In *Rodriguez, supra,* 222 Cal.App.4th at pages 592 to 594, the court rejected a challenge to a condition prohibiting the possession or use of controlled substances even though the condition did not include a scienter element. The court reasoned: "To the extent [the controlled substance prohibition] reinforces defendant's obligations under California Uniform Controlled Substances Act, the same knowledge element which has been found to be implicit in those statutes is reasonably implicit in the condition. What is implicit is that possession of a controlled substance involves the mental elements of its presence and of its nature as a restricted substance." (*Id.* at p. 593.)

Because the condition restricting the use or possession of controlled substances implements a statutory prohibition that incorporates an implied scienter element, the condition passes constitutional muster despite the absence of an express knowledge requirement. There is no need to strike or modify the condition.

F. Association

Condition 17 provides:

"17. Defendant shall not traffic in controlled substances nor associate with any person using or trafficking in controlled substances."

The portion of the condition prohibiting defendant from trafficking in controlled substances does not require an express scienter requirement for the reasons we have explained. The condition implements a statutory prohibition against selling controlled substances that already incorporates a scienter element. (See *People v. Coria, supra,* 21 Cal.4th at p. 878.) However, as the Attorney General concedes, the prohibition against associating with persons who use or traffic in controlled substances is not sufficiently narrow because it limits defendant's association with persons not known by her to be users or sellers of controlled substances. (*People v. Garcia*, *supra,* 19 Cal.App.4th at p. 102.) Consequently, the condition should be modified to specify that defendant shall not associate with persons *known* by her to be users or traffickers of controlled substances.

2. *Collection fee*

The trial court imposed a $600 fine pursuant to section 672 and directed defendant to pay a $35 collection fee as a condition of mandatory supervision. A collection fee is authorized by section 1205, subdivision (e) and may not exceed $30.

Defendant does not object to the imposition of a $600 fine but does advance two claims of error related to the associated collection fee. First, defendant contends that a collection fee cannot be imposed as a condition of mandatory supervision but must instead be imposed as a separate order. (See *People v. Hart* (1998) 65 Cal.App.4th 902, 906–907 [costs of probation may not be imposed as terms of probation].) He also argues that the fee should be reduced to $30.

The Attorney General concedes that the collection fee must be imposed as a separate order and may not exceed $30. Accordingly, we will direct the court to strike the collection fee as a condition of mandatory supervision and enter a separate order imposing a collection fee of $30 pursuant to section 1205, subdivision (e).

3. *Booking fee*

The trial court imposed a booking fee of $196.33 pursuant to Government Code section 29550.2. After imposing the fee in this case—which the court described as the "felony file"—the court turned to sentencing in a related misdemeanor case against defendant. In that case, the court stated: "I will make a finding, as well, the defendant does not have the ability to reimburse the county for the cost of the court-appointed attorney, nor the cost of the booking fee. That would be in both cases." The court then clarified its ruling: "I'm sorry. She did – I did order the booking fee in the felony file. The reason I did that is – I typically wouldn't, but she was booked so many times it seemed prudent to do that." Defendant did not object to the imposition of the booking fee in this case.

Government Code section 29550.2, subdivision (a) authorizes the court to impose a booking fee "[i]f the person has the ability to pay . . . ." Defendant contends the booking fee is unauthorized because the court found that she did not have the ability to pay the fee.

The Attorney General argues that defendant forfeited her right to challenge the imposition of the booking fee by failing to object at the time the fee was imposed. The Attorney General relies on *People v. McCullough* (2013) 56 Cal.4th 589, 597, in which our Supreme Court held that "a defendant who fails to challenge the sufficiency of the evidence [supporting imposition of a booking fee] at the proceeding when the fee is imposed may not raise the challenge on appeal."

The record shows that the trial court waived the booking fee in the misdemeanor case as a result of defendant's inability to pay the fee in that case. The trial court clarified that it was imposing the booking fee in this case and impliedly found that defendant had the ability to pay the fee. We agree with the Attorney General that defendant forfeited her right to challenge the booking fee as a result of her failure to object to its imposition at the sentencing hearing. We acknowledge that one could question how defendant had the ability to pay a booking fee in this case when she was found to lack the ability to pay a booking fee in another case, but the resolution to that question turns on a factual record we do not have. We lack a sufficient record because defendant failed to challenge the ruling and allow the trial court to explain the factual basis for its ruling. If defendant believed there was insufficient evidence to support a finding that she had the ability to pay the booking fee in this case but not in the misdemeanor case, she was obliged to raise the issue at the time she was sentenced.

DISPOSITION

The matter is remanded to the trial court with instructions to modify conditions 11, 13, 15, and 17 of defendant's mandatory supervision as follows:

"11. Defendant shall not knowingly own, possess, or have in her vehicle any knife with a blade longer than 2 inches, except kitchen knives which must be kept in her residence and knives relating to her employment."

"13. Defendant shall not knowingly consume, possess, or have under her custody and control any alcoholic beverage."

"15. Defendant shall not enter places where she knows alcohol is the chief item of sale."

"17. Defendant shall not traffic in controlled substances nor associate with any person she knows to be a user or trafficker of controlled substances."

The trial court is further directed to strike the $35 collection fee imposed as condition of mandatory supervision and issue a separate order directing defendant to pay a $30 collection fee. In all other respects, the judgment is affirmed.

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McGuiness, P.J.

We concur:

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Siggins, J.

_____
Jenkins, J.